



DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 502, 556, and 558

RIN 3141-AA32

Definitions; Background Investigation for Primary Management Officials and Key Employees; Gaming Licenses for Primary Management Officials and Key Employees

AGENCY: National Indian Gaming Commission, Department of the Interior.

ACTION: Proposed Rule.

SUMMARY: In 2022, the Commission issued a proposed rule seeking to amend the “primary management official” and “key employee” definitions; add definitions for “Gaming Enterprise” and “Tribal Gaming Regulatory Authority” (TGRA); and establish modern retention requirements for background investigations and licensing applications. The rule proposed vesting revocation hearing rights upon license issuance as well as in accord with tribal law, regulation or policy along with augmenting revocation decision notification and submission requirements. This revised proposed rule results from comments received. It permits tribes to designate and document other gaming enterprise employees as key employees and other employed gaming enterprise management officials as primary management officials, including TGRA personnel. Now such designations may occur by any documentary means. Updates to the key employee definition include custodians of gaming supplies and gaming operation employees authorized by the gaming operation for unescorted access to secure gaming areas, not vendors or other outside parties. The primary management official definition, however, now is narrower with the removal of individuals who have authority to supervise key employees of the gaming operation.

DATES: Written comments on this proposed rule must be received on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

- Federal eRulemaking Portal: Go to <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email comments to:* information@nigc.gov
- *Mail comments to:* National Indian Gaming Commission, 1849 C Street, NW., MS 1621, Washington, DC 20240.
- *Fax comments to:* National Indian Gaming Commission at 202-632-0045.

FOR FURTHER INFORMATION CONTACT: Jo-Ann Shyloski by phone at (202) 632-7003, by email Jo-Ann.Shyloski@nigc.gov, or by fax (202) 632-7066 (these numbers are not toll free).

SUPPLEMENTARY INFORMATION:

I. Background and Development of the Rule

A. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100-497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act established the National Indian Gaming Commission (“NIGC” or “Commission”) and set out a comprehensive framework for the regulation of gaming on Indian lands. IGRA requires that tribal gaming ordinances provide a system for: background investigations of “primary management officials and key employees of the gaming enterprise;” tribal licenses for them; a suitability standard to assess whether they pose a threat to gaming and are not eligible for employment; and notices of background check results to the Commission before the issuance of licenses.

The Commission first defined “key employee” and “primary management official” in April of 1992, early in its existence. As mandated by IGRA, applicants for key employee and primary management official positions are subject to a background investigation as a condition of licensure. In 2009, the Commission expanded these definitions to permit tribes to designate other persons as key employees or primary management officials (74 FR 36926). The FBI, U.S. Department of Justice, took issue with this expansion, denying the processing of CHRI for the expanded positions’ background investigations. The initial proposed rule and this revision rectify this issue in part 502. The revised proposed rule now limits tribal designations to “[a]ny other employee of the gaming enterprise as documented by the tribe as a key employee” and “[a]ny other employed management official of the gaming enterprise documented by the tribe as a primary management official.” Likewise constricted is the key employee definition in part 502 regarding unescorted access to secured gaming areas. Now, a key employee is “any *gaming operation employee* authorized by the gaming operation for unescorted access to *secured gaming* areas” Similarly constrained is the primary management official definition, because individuals who have authority “[t]o supervise key employees of the gaming operation” are no longer included. Lastly, the term *independent* now describes the Tribal Gaming Regulatory Authority (TGRA) definition, aligning with NIGC guidance about TGRAs.

Background investigation and licensing regulations for key employees and primary management officials were initially issued by the Commission in January 1993 (58 FR 5802-01) in parts 556 and 558, respectively. The Commission updated these regulations in 2013 to streamline the submission of documents; to ensure that two notifications are submitted to the Commission in compliance with IGRA; and to clarify the regulations regarding the issuance of temporary and permanent gaming licenses (78

FR 5276-01). As for parts 556 and 558, this revised proposed rule reflects the same changes as the initial proposed rule.

B. Development of the Rule

On, June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the key employee and primary management definitions and the backgrounding and licensing regulations. Prior to consultation, the Commission released proposed discussion drafts of the regulations for review. The proposed amendments to these regulations were intended to: address the FBI's concerns regarding the key employee and primary management official definitions; include gaming operation employees with unescorted access to secured areas as key employees; combine certain subsections of the key employee definition; add general managers and similar positions to the primary management official definition; and update licensing application retention requirements. The Commission held two virtual consultation sessions in July of 2021 to receive tribal input on the possible changes.

The Commission reviewed all comments received as part of the consultation process and addressed them in the initial proposed rule, issued on August 10, 2022. Once again, the Commission has thoroughly reviewed comments from the initial proposed rule and responds to them here. First, a commenter asserts that FBI's concerns about CHRI management have almost no connection to the intent of IGRA and should not be the bases for regulatory changes to the key employee and primary management official definitions. The Commission disagrees. The NIGC receives CHRI from the FBI for the purpose of tribes' backgrounding key employees and primary management officials. So, it is the FBI who determines when it is and is not appropriate to share CHRI for that purpose. Given the FBI's authority over CHRI, NIGC consulted with FBI on NIGC's regulatory proposals and considered its views.

Along the same lines, another commenter believes the proposed changes to the key employee and primary management official definitions may impair tribal compliance with the Criminal Justice Information Systems (CJIS) Security Policy, governing CHRI use, storage, and destruction. That will not be the case. The current NIGC-Tribal CHRI Memorandum of Understanding (MOU) explicitly accommodates and applies to new regulatory definitions for key employees and primary management officials. Consequently, when new key employee and primary management official regulatory definitions become effective, the current CHRI MOU applies to them and remains applicable to CJIS compliance, ensuring its continuity.

Beyond the FBI and CJIS Security policy comments, several commenters recommended changes to the initial proposed rule that the Commission accepted. Notably, when tribes designate gaming enterprise employees as key employees or employed gaming enterprise management officials as primary management officials, they no longer have to do so through their gaming ordinances. Instead, tribes must document the designations through different means, such as gaming commission regulations, which presumably are easier to revise and implement. In addition, the primary management official definition no longer includes individuals who have authority “to supervise a key employee of the gaming operation,” because, as commenters noted, such a definition could encompass team leaders and dual-rate employees who possess supervisory duties but not managerial duties.

Commenters also advocated for additions and changes to terminology in the proposed rule. The Commission added custodian of “gaming supplies” to the key employee definition, given the importance of these supplies to the integrity of gaming as well as mitigating the risk of tampering by licensing the employees who handle, access, or have custody of them. The Commission modified terms in the key employee definition as well. Specifically, “any person authorized by the gaming operation for unescorted

access to restricted areas” now reads: “any *gaming operation employee* authorized by the gaming operation for unescorted access to *secured gaming* areas . . .” The Commission removed the term *person*, as a broad interpretation of it could include vendors. Further, changing the term *restricted* to *secured* not only reflects comments received but also aligns with NIGC’s minimum internal control standards, where *secured* is utilized in reference to the cage, count room, surveillance room and vault as well as in numerous MICS regulations referencing secure area, secure location and secure access. Lastly, the Commission added the term *independent* to the Tribal Gaming Regulatory Authority (TGRA) definition, as recommended by a commenter and in accord with NIGC guidance. Further, TGRAs come within the Gaming Enterprise definition — as entities through which tribes regulate gaming under IGRA on their Indian lands within their jurisdiction. And if a tribe so chooses, it may designate TGRA personnel as key employees or primary management officials by documenting its designation. There are several regulations in part 558 where commenters recommend that the term *TGRA* supplant the term *Tribe*. The term *Tribe* encompasses *TGRA*; so the Commission did not alter the wording.

In addition, several commenters view the substantive submission requirement associated with a key employee or primary management official’s license revocation as onerous and unnecessary. Yet, the required submissions— a copy of the license revocation decision and a summary of the evidence supporting it— allow the NIGC to potentially object when previously revoked licensees apply for a new license. Tribal revocations are not contained in other background checks, including FBI CHRI. Ultimately, these submissions further protect and enhance the integrity of Indian gaming.

Lastly, commenters challenged the Commission’s authority to define “Gaming Enterprise” and incorporate it into NIGC regulations. The IGRA mandates tribal gaming ordinances possesses “an adequate system which . . . ensures that background investigations are conducted on the primary management officials and key employees of

the gaming enterprise.” Given this plain statutory language, defining the term “gaming enterprise” is appropriate and within NIGC’s authority.

II. Regulatory Matters

Regulatory Flexibility Act

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of \$100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions, nor will the proposed rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq.

Paperwork Reduction Act

1. Overview

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501, et seq., provides that an agency may not conduct or sponsor, and a person is not required to respond to, a “collection of information,” unless it displays a currently valid OMB control number. Collections of information include any request or requirement that persons obtain, maintain, retain, or report information to an agency, or disclose information to a third party or to the public (44 U.S.C. 3502(3) and 5 CFR 1320.3(c)). This proposed rule contains new information collection requirements at 25 CFR 558.3(e) that are subject to review by OMB under the PRA and, accordingly, have been submitted to OMB for review under the PRA, Section 3507(d). OMB previously reviewed and approved information collection relating to 25 CFR 558.3 and assigned OMB control number 3141-0003 (expires 6/30/2023).

Described below are the proposed rule’s information collection activities along with estimates of their annual burdens. These activities, along with annual burden estimates, do not include activities that are usual and customary industry practices. The burden estimates comprise the time necessary for Tribes to forward to the NIGC copies of their license revocation decisions and evidence summaries supporting such

revocations, unless they already submit such to the NIGC in the usual course of their business. The burden also may include the time necessary for Tribes to summarize the evidence they relied upon for each revocation decision, if such summary does not already exist for tribal purposes and/or the Tribe does not send it to the NIGC as a customary business practice.

The Commission requests comment on all aspects of this information collection, including:

- a. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- b. The accuracy of the estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;
- c. Ways to enhance the quality, utility, and clarity of the information to be collected; and
- d. How the agency might minimize the burden of the collection of information on those required to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

2. Summary of Proposed Information Collection Requirements and Burden Estimates

Title of Collection: Class II and Class III / Background Investigation Tribal Licenses.

OMB Control Number: 3141-0003.

Form Number: None.

Type of Review: New rule with added collection burden.

Respondents/Affected Public: Tribal gaming operations of Indian Tribes that conduct Class II and/or Class III gaming under the Indian Gaming Regulatory Act.

Respondent's Obligation: Mandatory.

Frequency of Collection: On occasion.

The new rule proposed under 25 CFR 558.3(e) will create the following estimated burdens:

Total Estimated Number of Annual Responses: 100

Estimated Completion Time per Response: 1 hour.

Total Estimated Number of Annual Burden Hours: 100 hours.

Total Estimated Annual Non-Hour Burden Cost: None.

3. Written Comments or Additional Information

Written comments and suggestions on the information collection requirements should be submitted by [INSERT DATE 45 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Submit comments directly to OMB's Office of Information and Regulatory Affairs, Attn: Policy Analyst/Desk Officer for the National Indian Gaming Commission. Comments also may be emailed to OIRA_Submission@omb.eop.gov, by including reference to "NIGC PRA Renewals" in the subject line.

To request additional information about this ICR, contact Tim Osumi, Privacy & Records Information Manager, NIGC Information Management Program by email at tim.osumi@nigc.gov or by telephone at (202) 264-0676.

Tribal Consultation

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (E.O.) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy, published July 15, 2013. The NIGC's consultation policy specifies that it will consult with tribes on Commission Action with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or

operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to the ability of an Indian tribe to regulate its Indian gaming; an Indian tribe's formal relationship with the Commission; or the consideration of the Commission's trust responsibilities to Indian tribes.

Pursuant to this policy, on June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the key employee and primary management official regulatory definitions as well as the background and licensing regulations. Consultations were held on July 27 and 28, 2021. A proposed rule was issued on August 10, 2022.

List of Subjects in 25 CFR Parts 502, 556, 558

Gambling, Indian lands.

Therefore, for reasons stated in the preamble, 25 CFR parts 502, 556, and 558 are proposed to be amended as follows:

PART 502—DEFINITIONS OF THIS CHAPTER

1. The authority citation for part 502 continues to read as follows:

Authority: 25 U.S.C. 2701 *et seq.*

2. Revise § 502.14 to read as follows:

§ 502.14 Key employee.

Key employee means:

(a) Any person who performs one or more of the following functions for the gaming operation:

- (1) Bingo caller;
- (2) Counting room supervisor;
- (3) Chief of security;
- (4) Floor manager;

- (5) Pit boss;
- (6) Dealer;
- (7) Croupier;
- (8) Approver of credit;
- (9) Custodian of gaming systems as defined in 25 CFR 547.2 and similar class III systems, gaming cash or gaming cash equivalents, gaming supplies or gaming system records;
- (10) Custodian of surveillance systems or surveillance system records.
- (b) Any gaming operation employee authorized by the gaming operation for unescorted access to secured gaming areas designated as secured gaming areas by the TGRA;
- (c) If not otherwise licensed as a key employee or primary management official, the four persons most highly compensated by the gaming operation;
- (d) Any other employee of the gaming enterprise as documented by the tribe as a key employee.

3. Revise § 502.19 to read as follows:

§ 502.19 Primary management official.

Primary management official means:

- (a) Any person having management responsibility for a management contract;
- (b) Any person who has authority:
 - (1) To hire and fire employees of the gaming operation; or
 - (2) To establish policy for the gaming operation.
- (c) The chief financial officer or a position with duties similar to a chief financial officer.
- (d) The general manager or a position with duties similar to a general manager.

(e) Any other employed management official of the gaming enterprise as documented by the tribe as a primary management official.

4. Add §§ 502.25 and 502.26 to read as follows:

§ 502.25 Gaming Enterprise.

Gaming Enterprise means the entities through which tribe conducts, regulates, and secures gaming on Indian lands within such tribe's jurisdiction pursuant to the Indian Gaming Regulatory Act.

§ 502.26 Tribal Gaming Regulatory Authority (TGRA).

Tribal Gaming Regulatory Authority (TGRA) means the independent governmental entity authorized by tribal law to regulate gaming conducted pursuant to the Indian Gaming Regulatory Act.

**PART 556—BACKGROUND INVESTIGATIONS FOR PRIMARY
MANAGEMENT OFFICIALS AND KEY EMPLOYEES**

5. The authority citation for part 556 continues to read as follows:

Authority: 25 U.S.C. 2706, 2710, 2712.

6. Amend § 556.4 by revising the introductory text to read as follows:

§556.4 Background investigations.

A tribe shall perform a background investigation for each primary management official and for each key employee of the gaming enterprise.

7. Amend § 556.6 by revising paragraph (a) to read as follows:

§ 556.6 Report to the Commission.

(a) When a tribe licenses a primary management official or a key employee, the tribe shall maintain the information listed under § 556.4(a)(1) through (14).

8. Revise § 556.8 to read as follows:

§ 556.8 Compliance with this part.

All tribal gaming ordinances and ordinance amendments approved by the Chair prior to [effective date of final rule] do not need to be amended to comply with this part. All future ordinance submissions, however, must comply.

PART 558—GAMING LICENSES FOR KEY EMPLOYEES AND PRIMARY MANAGEMENT OFFICIALS

9. The authority citation for part 558 continues to read as follows:

Authority: 25 U.S.C. 2706, 2710, 2712.

10. Revise § 558.3 to read as follows:

§ 558.3 Notification to NIGC of license decisions and retention obligations.

- (a) After a tribe has provided a notice of results of the background check to the Commission, a tribe may license a primary management official or key employee.
- (b) Within 30 days after the issuance of the license, a tribe shall notify the Commission of its issuance.
- (c) A key employee or primary management official who does not have a license after ninety (90) days shall not be permitted to perform the duties, functions, and/or responsibilities of a key employee or primary management official until so licensed.
- (d) If a tribe does not license an applicant—
 - (1) The tribe shall notify the Commission; and
 - (2) Shall forward copies of its eligibility determination and notice of results, under § 556.6(b)(2) of this chapter, to the Commission for inclusion in the Indian Gaming Individuals Record System.
- (e) If a tribe revokes a key employee or primary management official's license—

- (1) The tribe shall notify the Commission; and
- (2) Shall forward copies of its license revocation decision and a summary of the evidence it relied upon to the Commission for inclusion in the Indian Gaming Individuals Record System.
- (f) A tribe shall retain the following for inspection by the Chair or their designee for no less than three years from the date of termination of employment:
 - (1) The information listed under § 556.4(a)(1) through (14);
 - (2) Investigative reports, as defined in § 556.6(b);
 - (3) Eligibility determinations, as defined in § 556.5;
 - (4) Privacy Act notice, as defined in § 556.2; and
 - (5) False Statement notice, as defined in § 556.3.

11. Revise § 558.4 to read as follows:

§ 558.4 Notice of information impacting eligibility and licensee's right to a hearing.

- (a) If, after the issuance of a gaming license pursuant to § 558.3 of this chapter, the Commission receives reliable information indicating that a key employee or a primary management official is not eligible for a license under § 556.5 of this chapter, the Commission shall notify the issuing tribe of the information.
- (b) Upon receipt of such notification under paragraph (a) of this section, a tribe shall immediately suspend the license and shall provide the licensee with written notice of suspension and proposed revocation.
- (c) A tribe shall notify the licensee of a time and a place for a hearing on the proposed revocation of a license.
- (d) The right to a revocation hearing shall vest upon receipt of a license or at such earlier time as is determined by tribal law, regulation, and/or policy.

(e) After a revocation hearing, a tribe shall decide to revoke or to reinstate a gaming license. A tribe shall notify the Commission of its decision within 45 days of receiving notification from the Commission pursuant to paragraph (a) of this section.

12. Revise § 558.6 to read as follows:

§ 558.6 Compliance with this part.

All tribal gaming ordinances and ordinance amendments that have been approved by the Chair prior to [effective date of final rule], and that reference this part do not need to be amended to comply with this section. All future ordinance submissions, however, must comply.

Dated: March 27, 2023.

Edward Simermeyer,

Chairman.

Jean Hovland,

Vice Chair.